

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 30, 2007 Session

BRIAN HARLOW v. JEWELL CANTRELL

**Appeal from the Chancery Court for Overton County
No. 35-604 Vernon Neal, Chancellor**

No. M2006-00615-COA-R3-CV - Filed on September 11, 2007

The sole issue presented on this appeal is whether the trial court abused its discretion by denying a motion for a continuance filed by one of the parties to this action. The basis of the motion was that the moving party, Brian Harlow, had accepted employment driving a bus in the state of California. The motion for continuance was denied and the trial of the case proceeded in Mr. Harlow's absence. Judgment was rendered against Mr. Harlow and he has appealed. We are unable to find that the trial court abused its discretion by denying the continuance and affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

Michael R. Giaimo, Livingston, Tennessee, for the appellant, Brian Harlow.

Craig P. Fickling, Cookeville, Tennessee, for the appellee, Jewell Cantrell.

MEMORANDUM OPINION¹

Brian Harlow and Jewell Cantrell entered into a partnership agreement on April 28, 2004. The partnership was known as East Main Thrift, G.P., and was formed for the purpose of operating a retail thrift store in Livingston, Tennessee. On June 24, 2004, Mr. Harlow filed suit in the Chancery Court for Overton County, Tennessee, alleging that Mr. Cantrell had wrongfully disassociated himself from the partnership and praying for damages resulting from Mr. Cantrell's

¹Tenn. Ct. App. R. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

alleged breach of the partnership agreement. On December 2, 2004, an order was entered setting the case for trial on January 20, 2005. An answer and counterclaim were filed by Mr. Cantrell on December 22, 2004. For reasons that do not appear in the record, the case was not tried at the January 20, 2005 setting.

Thereafter, the case was again set for trial on October 11, 2005, by order entered June 2, 2005. The Clerk and Master for Overton County certified a copy of this order was personally delivered to the attorneys for the respective parties. On the date of trial, counsel for Mr. Harlow moved the trial court for a continuance supported by counsel's affidavit. The affidavit reflects Mr. Harlow had obtained a job driving a bus for an organization promoting breast cancer awareness and would be in San Diego, California, on the day of trial. The affidavit also stated Mr. Harlow had advised his counsel that he was not aware of the trial date until he received correspondence related to the scheduling of pre-trial depositions. Counsel stated that he could not "speak to Mr. Harlow's statement that he did not have notice of the trial setting." It was also noted in the affidavit that the trial court had previously denied an application for continuance during a telephone conference call.

The trial of the case proceeded in Mr. Harlow's absence. After hearing the evidence presented, the trial court dismissed the complaint filed by Mr. Harlow and granted Mr. Jewell a judgment on his counterclaim in the amount of \$17,625.00. Additionally, the judgment reflected Mr. Harlow would be solely responsible for a state sales tax lien in the amount of \$14,057.24.

Mr. Harlow filed a motion for new trial contending the trial court had erred by denying his motion for a continuance. The motion was supported by the affidavit of Mr. Harlow. In his affidavit, Mr. Harlow recites that he was in San Diego at the time of the depositions and final hearing working as a contract bus driver. He stated if he had left that job, he would not have been able to obtain another position for an extended period of time and attending the trial would have caused a financial hardship. He added: "Even though I had several weeks notice of the depositions and the final hearing, I could not obtain a leave of absence . . ." The motion for new trial was denied by the trial court by order dated February 13, 2006.

From the order denying him a new trial, Mr. Harlow has appealed. The sole issue presented for our review is whether the trial court abused its discretion in failing to grant Mr. Harlow a continuance of the final hearing in this cause.

Whether or not to grant a continuance is a matter that lies within the sound discretion of the trial court. Mires v. Clay, 3 S.W.3d 463, 467 (Tenn. Ct. App. 1999). The trial court's decision denying a continuance will not be disturbed on appeal absent a showing that the court abused its discretion and that the party seeking a continuance has been prejudiced. Blake v. Plus Mark, Inc., 952 S.W.2d 413, 415 (Tenn. 1997).

The abuse of discretion standard has been stated in varying ways. It has been said that an abuse of discretion occurs when the lower court's decision is without a basis in law or fact and is, therefore, arbitrary, illogical, or unconscionable. State v. Brown & Williamson Tobacco Corp., 18

S.W.3d 186, 191 (Tenn. 2000). In White v. Vanderbilt Univ., 21 S.W.3d 215 (Tenn. Ct. App. 1999), this court stated that discretionary decisions of a trial court will be set aside only when "the trial court has misconstrued or misapplied the controlling legal principles or has acted inconsistently with the substantial weight of the evidence." Id. at 223. This court has also said that under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made." Buss-Flinn v. Flinn, 121 S.W.3d 383, 390 (Tenn. Ct. App. 2003) (quoting, State v. Scott, 33 S.W.3d 746, 752 (Tenn. 2000)). The Tennessee Supreme Court has said that a trial court abuses its discretion only when it "applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining." State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999). However it is stated, it is clear that the abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. Myint v. Allstate Ins. Co., 970 S.W.2d 920, 927 (Tenn. 1998); Buss-Flinn, 121 S.W.3d at 390.

Based upon the record before us, we know that Mr. Harlow had several weeks notice of the date of the final hearing in this case. We do not know when Mr. Harlow accepted the contract to operate the bus in California, but either he already had the job and failed to timely advise the court or he accepted the employment knowing it would conflict with his trial date. The first indication a conflict existed was a letter from Mr. Harlow's counsel, dated October 5, 2005, faxed to Mr. Cantrell's counsel notifying him that Mr. Harlow was in San Diego and would not be present for the scheduled depositions or the final hearing. Based upon the facts presented to the trial court, it could reasonably be concluded that Mr. Harlow had the ability to be present for depositions and trial but elected to be elsewhere. Mr. Harlow had the choice to either attend his trial or suffer the consequences of failing to attend. He chose the latter. Under those circumstances, we are unable to conclude the trial court abused its discretion by denying a continuance.

The judgment of the trial court is affirmed and the cause is remanded for any further proceedings that may be necessary. The costs of this appeal are assessed to Brian Harlow.

DONALD P. HARRIS, SENIOR JUDGE